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Book Review [The Aged and the Need for Surrogate Management]

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BOOK REVIEWS

THE AGED AND THE NEED FOR SURROGATE MANAGEMENT. By George J. Alexander and Travis H. D. Lewin. Syracuse University: 1972.

Dean Alexander's and Professor Lewin's work, *The Aged and the Need for Surrogate Management*, examines our institutional responses to the problems confronting the elder citizen. The book stems from a study of more than 500 recent cases involving problems of the aged taken from New York State's Tompkins and Onondaga counties. Using the cases as a foundation, the authors structure a thorough discussion of the socio-legal problems which arise from guardian-conservatorship.

Presently, 21 million Americans are over 65 years old, and it is anticipated that there will be 30 million by 1990. These citizens are afflicted with maladies unique to their age group including slowing memories, failing judgment and designing heirs. These problems give rise to a need for guidance and advice concerning the individual's property and personal well-being. The authors reveal our legal process's inability to respond on a uniformly high standard to these important problems. They note that our institutional treatment of the aged affects all economic classes. Additionally, we are told that "[b]y looking to the disposition of the aged's property, we can gain insight into society's general attitudes toward the other problems facing the elderly."[1]

The research which buttresses the text's conclusions is comprehensive and well conceived. In 1968, while professors at Syracuse University Law School, the authors sought to ascertain whether the goals of our states' incompetency statutes were being achieved. They chose the New York Incompetency Act[2] as an archetype of national legislation in this area, and they selected Tompkins and Onondaga counties as representative demographic examples of the nation's population. I am persuaded that the text supports the authors' choice of these study samples as national norms, and that the extensive analysis of ten years of surrogate court files reveals

1. G. ALEXANDER & T. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT iii (1972).
2. N.Y. MENTAL HYGIENE LAW §§ 100 *et seq.* (McKinney 1971).

the ineffectiveness not only of New York's act, but also of her sister states.[3]

The writers are greatly concerned with the judicial proceedings which determine a citizen's "functional competence." Noting that the ultimate implications of these surrogate management and competency proceedings to the elderly defendant are potential loss of self-determination and deprivation of property rights, the authors scrutinize the present system. We are asked to consider whether a judge can make an accurate determination based mainly on the testimony of the petitioner, usually a potential heir, and on that of an expert witness, a doctor paid for by the petitioner.

The authors also discuss the administration of public institutions provided for the aged. We are told of the state's efforts to acquire and husband its institutional guests' assets. This process is justified on two grounds: one, the state argues that it must recoup a portion of the cost of maintaining the institution to assuage the general taxpayer; and two, public policy claims it is protecting the aged citizen's property from society's mendacious clutches. However, the authors point out that the citizen is not compensated for the loss of his resources with good health care and well-managed institutions.

Another area the text investigates concerns surrogate management where the citizen is not institutionalized. This situation calls for a judgment on the degree of extra-institutional supervision needed to protect the elder person. The authors propose statutes which will empower the courts to tailor individual programs for each patient in order to minimize his segregation from society. In their model statute the writers create a flexible posture for the surrogate which allows him a range of power from mere advice to complete control over the property. We are told that this form of adaptible system has been used effectively by the Social Security Administration with their "representative payee" program.[4] The "payee," a close friend or relative, receives the eligible citizen's monthly social security check and pays for his rent, food and other expenses. The Veterans Administration has implemented a similar plan.[5] The authors believe that such systems have the advantages of minimizing management expenses and maximizing the afflicted citizen's civil rights.

My forty years of practice compell me to criticize the book's depiction of an heir's character. I feel that the authors' use of the

3. 9 A.L.R.3d 774 (1966). This annotation reviews pertinent state statutes relating to incompetency and guardianship.

4. For the text of applicable statutes see 42 U.S.C. § 405(J) (1971), 20 C.F.R. §§ 404.1601-404.1610 (1972).

5. 38 C.F.R. § 13.59 (1972).

phrase "laughing heir," and their editing of case samples leaves an impression that all heirs are motivated solely by selfish interests. In my experience the petitioner's prime concern is the constructive management of the incompetent's funds. Additionally, a perspicacious disposition of the funds protects the petitioner from a personal expenditure for his relative's unpaid bills at a later date.

In conclusion, Dean Alexander and Professor Lewin deserve praise for their excellent study. Throughout, the book retains perspective, balancing retrospective and prospective examination of the problems of surrogate management for the aged. The authors' selective appendix of present state statutes and model statutes will provide research sources for the practicing bar and legislators. Also, students of Family Law investigating the legal problems of the aged will find this work an invaluable source. I believe that *The Aged and the Need for Surrogate Management* furnishes a constructive evaluation of the aged's socio-legal problems which was heretofore unavailable.

*Norman J. Kalcheim**

* Partner, Abrahams & Loewenstein, Philadelphia; Member of Family Law Section Council A.B.A.; Chairman, Committee on Legal Problems of the Aged, A.B.A.; Member, Philadelphia Commission on the Aging; Delegate of A.B.A. to White House Conference on the Aging, 1971.

PRISONERS OF PSYCHIATRY. By Bruce Ennis. New York: Harcourt Brace Jovanovich, 1972. Pp. xix + 232. $6.95.

A generation ago, Huxley's *Brave New World* and Orwell's *1984* warned of a coming psychological totalitarianism. Within the last decade, writers like R. D. Laing[1] and Thomas Szasz[2] have adduced evidence to show that we are well on the way to a psychiatric dystopia. Bruce Ennis' *Prisoners of Psychiatry*, an account of three years spent counselling psychiatric patients for the New York Civil Liberties Union, adds substantial and substantive support to this prediction. Other writers on this topic have supported their arguments with a few specific examples of psychiatric persecution. Ennis utilizes a case study approach. The cases allow the reader to see where psychiatric power has broken down our constitutional safeguards, and to see what impact this has had on the individual at the human level.

This book is shocking, not because Ennis describes those instances of gross psychiatric malpractice and brutality that any court of law would condemn, but because he describes destructive and totalitarian conduct by mental health officials that has the courts' blessing. Ennis' aim was not to expose instances of inherently unlawful behavior that just happened to be associated with psychiatric patients. Rather, he sought test cases with which to reform the law. This is the shocker: case after case where mental health officials and psychiatrists arbitrarily deprive citizens of their liberties, with the full sanction of the courts.

"MENTALLY ILL"—THE LABEL

Psychiatrists derive their power from their authority to apply the label "mentally ill" to unwanted members of society. The application of this label cancels the indivdual's constitutional rights. Courts do not deny a person the right to a fair trial because of his race, politics, or religion; however, they routinely deny a person the right to a fair trial just because a psychiatrist declares him "mentally ill." This label functions as a tool whereby a person may be punished or removed from society without the usual safeguards: presumptions of innocence, rules of evidence, and all other elements

1. R.D. LAING, THE POLITICS OF EXPERIENCE (1967); R.D. LAING & A. ESTERSON, SANITY, MADNESS, AND THE FAMILY (1964).

2. T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); T. SZASZ, THE MANUFACTURE OF MADNESS (1970); T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961).

of due process. Ennis' experiences indicate that when a prosecuting attorney has insufficient evidence to pursue a criminal case on its merits and the defendant has some peculiarity or history compatible with a suspicion of "mental illness," the prosecutor will often try to get the defendant declared incompetent to stand trial. If the government psychiatrist finds the defendant "mentally ill," he may be salted away for life in an institution for the criminally insane, without trial. Thus an individual's life and liberty is sacrificed to bureaucratic expediency.[3]

Ennis cites figures that emphasize the magnitude of the problem. Our mental hospitals house three quarters of a million persons. Most are hospitalized against their will; a large proportion are permanently incarcerated. There are one and a half million admissions per year, most involuntary. For every person imprisoned in our penal institutions, three are imprisoned in our mental institutions; very few of the latter have been convicted of any crime. Fewer than five percent are considered dangerous by their jailers; the rest are incarcerated because they are odd, unwanted, or annoying. Although the ostensible purpose of these institutions is therapeutic, the majority of those interned are permanently damaged by hospitalization. Physical and social conditions in mental hospitals are much worse, as a rule, than those in prisons. Even if a patient is discharged, the stigma attached to having been hospitalized is permanently debilitating, perhaps worse than that of having been a convict.

Apart from the ordinary penal system, then, there is a separate and considerably larger penal system administered entirely by the psychiatric establishment. The "crimes" are those of being odd or unwanted or having strange or potentially dangerous thoughts. The punishments are more extreme than in the official penal system, and instead of policemen, attorneys, judges, and prison wardens there are mental health officials. The system operates independently of the courts and the constitution.

State laws require the pschiatric system to connect with the judicial system at certain points. Such laws appear to limit the autonomy of the psychiatric system, but they also define it into existence. Laws regulating involuntary hospitalization and incompetency proceedings allow psychiatrists to abridge personal freedom, providing they comply with certain formalities. The stringency psychiatrically contrived myth that there is a thing called "mental illness": a mysterious cancer in our society which psychiatrists

3. T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 186 *et seq.* (1963). Dr. Szasz describes how nearly every right guaranteed in the Constitution is legally violated once the label "mentally ill" is applied.

of these regulations varies widely from state to state,[4] but underlying these regulations is the unquestioned propriety of giving psychiatrists the authority to suspend a person's constitutional rights. The continued high rate of commitments belies the efficacy of these regulations in protecting the individual.[5]

The psychiatric system commands such authority and the idea that psychiatrists could make mistakes or act unethically is so remote from popular opinion, that the legislation subjecting it to judicial review has no substantial effect on the system's autonomy. Incompetency proceedings are, on the whole, formalities wherein the judge routinely sanctifies the psychiatrist's authority. In these proceedings judges rarely weigh the evidence and form their own opinions of the defendant's competence. They are usually concerned solely with whether one or two psychiatrists say he is incompetent. Ennis recounts one incident in which hospital administrators, seeking to attach the savings an inmate had astutely accumulated, petitioned a court to declare her incompetent to manage her estate. The petition contained a false attestation that she had been examined and found incompetent by a psychiatrist. The judge found her incompetent wholly on the basis of the attestation, without ever seeing the inmate involved. In this case, the law requiring a judge to determine the issue of incompetency was a meaningless bureaucratic exercise. In another case, a patient was committed for long term hospitalization. The psychiatrist supported his diagnosis of paranoid schizophrenia with the defendant's decision to quit smoking in response to the Surgeon General's Report. The presiding judge did not see fit to dispute this reasoning.

BLOCKS TO CHANGE

One might think that in the face of such gross injustices, the courts, as guardians of our Constitution, would hasten to remedy the situation. Yet a determined lawyer such as Ennis is steadfastly opposed by the New York legal and mental health bureaucracies in trying to get the issue before the courts. Judges repeatedly

4. The states' legislation covering mental patients and commitment is summarized in an excellent handbook recently published by the American Civil Liberties Union. B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS (1973).

5. The data on California's recently tightened commitment procedures is to the contrary: California has only 1/5 the state inmate population as loosely regulated New York has. Yet other jurisdictions with equally stringent commitment requirements continue to have astronomical commitment rates. California's low rate is probably due to its laudable policy of phasing out state hospitals in favor of community services. B. ENNIS, PRISONERS OF PSYCHIATRY, 223-24 (1972).

ignore obvious facts and rule in favor of bureaucratic expediency. Any possible technicality is used to favor the interest of the psychiartic system. When state mental health authorities are clearly wrong in opposing a mental patient, judges frequently act in such a way as to avoid setting a new precedent favoring the mental patient or censuring the state's agent. Usually the judge will warn the state agency that unless it concedes to the patient, he will enter judgment against it. The state then backs down, and avoids the adverse precedent. After a case is dismissed as moot, the state is free to switch its position again until the case is relitigated. On the other hand, if the mental patient is likely to lose the case, he receives no such judicial warning. This practice enables state mental health authorities to establish and maintain the legal precedents suporting their autonomy.

WHY ATTACK THE "MENTALLY ILL"?

There is a two-pronged legal attack against those labelled "mentally ill": 1) the legislatures pass laws creating a separate psychiatric penal system, and 2) judges construe these laws so as to restrict mental patients as much as possible and they actively resist constitutional challenges that would restore the patients' rights. While we must deplore this state of affairs, it is also important to understand it. In restricting the "mentally ill," legislators and judges are responding to public opinion both as members of that public and as official servants seeking to promote its welfare. Therefore, to understand why mental patients are denied the protection of the law, we must consider why society wishes to suppress them.

An argument frequently made for incarcerating the "mentally ill" is that they are dangerous. This argument is wholly unsupported by the available evidence. Ennis points out that mental patients and ex-mental patients are statistically far less likely to commit crimes, particularly violent crimes, than the average citizen.[6] Furthermore, even if there is, arguably, a real danger, should not such individuals have the same civil rights as known criminals, particularly recidivists? We do not jail a man for what he might do in the future. The infringement of human rights in so doing is far more destructive to society than the risk incurred in allowing such persons to go free.

The media aggravate the situation by reflecting and confirming the widespread notion that mental patients are dangerous. "Psychopathic" killings such as those by the Boston Strangler or

6. *Id.* at 26-27, 225-27.

the Zodiac Killer, although exceedingly rare, are the most newsworthy of items. If an infamous murderer has ever had psychiatric counselling, the press emphasizes this fact and with 20/20 hindsight suggests that the dangerousness could have been spotted. Hearing of such events arouses great fear in the public because it raises the possibility that anyone might be a killer. Public insecurity is further increased by the newspapers' practice of stressing the apparent normality of such people before their "insane attack." The public infers that we must give to the psychiatrists more power to identify and lock up such people before they have a chance to run amok.

There is also widespread public support for involuntary hospitalization of a person who wishes to kill himself. The consensus is that persons who make suicidal attempts or gestures are really asking for help and really want to be restrained regardless of what they say to the contrary. But imputed unconscious motivation is completely unprovable. This notion could justify forcing a person to donate money to the state just because a state-appointed psychiatrist testifies that this is what he really wants to do. This may seem absurd, yet to confiscate a person's money is far less odious than to incarcerate him because this is what someone, who happens to be a psychiatrist, decides he "really" wants. This argument could rationalize the worst kind of totalitarianism, in which the state decides what everyone "really" wants and regards any deviation from that standard as "mental illness" requiring compulsory treatment.

A major function of the psychiatric prison system is to relieve society of those problematical persons who disturb others without breaking any laws. Anyone who has worked as an admitting psychiatrist realizes that the most common reason people are involuntarily hospitalized is that friends, neighbors, and family members wish them to be. Perhaps the patient has for weeks terrorized his family with continual threats of suicide or kept them up night after night screaming and thrashing and breaking up the furniture. Perhaps he is well known to the police for having been picked up nude in various parts of town in the dead of winter. This extreme nuisance value is a common reason for involuntary hospitalization. Here the psychiatrist is called in as a social garbage collector to pick up people who are so difficult that no one else is willing to cope with them. These people usually have not broken any laws warranting incarceration, but they often cause greater suffering to those around them than people who have broken laws. Even though mental patients are not more dangerous than others, they are often destructive of order and tranquility in their immediate environments. Therefore, it is said to be in the

interest of the greatest good for the greatest number if such people are put away where they cannot bother anyone except themselves. Also, there is the myth that hospitalization is therapeutic; it is easier to hospitalize an unwanted family member or neighbor if one can maintain the illusion that it is for the person's own good, rather than a destructive act performed in self-defense. But there is no good argument for involuntary hospitalization, just as there is no good argument for waging war, for picking on little kids, or for wifebeating. Yet one can understand the psychological forces behind these actions. When a person cannot cope with something, he tries to get away from it, to put it somewhere else, to scare it away, to destroy it. When we cannot fix the TV, we kick it or throw it away. We do this to difficult people by labeling them "mentally ill." This is the final solution to the mental illness problem. It was the original rationale for psychiatric prisons, and it remains the main unspoken rationale for the present psychiatric prison system.

While the concept of mental illness has been useful as a justification for social garbage collecting, it has not proved useful as a therapeutic tool. The term "mental illness" suggests that some disease process occurs within an individual carrying the label, like arteriosclerosis or chickenpox. However, biochemical, neurological, and physiological theories of mental illness—and there have been many—have uniformly failed to test out in practice over time. "Psychopathological" theories, such as Freud's, have failed to yield therapeutic techniques that can cure the manifestations they label as "psychotic."

Dr. Szasz has discussed at length how the concept of mental illness is used to justify scapegoating unpopular individuals. He points out that societies have always sought scapegoats to account for their disturbances. In the middle ages, it was the Devil, acting through the agency of witches; today, it is "mental illness" acting through the so-called "mentally ill."[7] The moral and theological language of the middle ages is replaced by the quasi-therapeutic language of modern times,[8] in which Oswald and Hitler are not evil but crazy, and in which war is not mass immorality but mass "insanity." Since insanity is seen as the cause of socially destructive behavior, society supports psychiatric persecution of the "insane."

Ennis joins Szasz in concluding that we must throw out the

7. T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961); T. SZASZ, THE MANUFACTURE OF MADNESS (1970).

8. *See* the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL of mental disorders—the official compendium of all psychiatric diagnoses—for a description of almost every conceivable type of human behavior.

can diagnose and cure. This myth provides a justification for what is a persistent tendency in societies toward persecuting the unpopular. The road to *1984* begins with persecution of a minority and ends with persecution of the majority. The concept of mental illness is inconsistent with a free society, where even the weird, unwanted, and troublesome must have the full protection of the laws. If a person commits crimes, he should be prosecuted with full legal safeguards, but if not, he should be free to pursue whatever existence he chooses. I advocate, and believe that Ennis would agree, that we abolish the problem of mental illness by abolishing the concept of mental illness.

*Frank A. Gerbode, M.D.**

* B.A., Stanford University, 1962; M.D., Yale University, 1968; Dr. Gerbode completed his psychiatric training at the Stanford University Medical Center, 1972.